92-998

Supreme Court, U.S.
FILED
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

In Re:

ESTATE OF WILLARD S. McCUE, Deceased

JOHN McCUE

Petitioner

vs.

ESTATE OF WILLARD S. McCUE,
Mark McCue, Personal Representative

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MINNESOTA

JOHN TUOHY
77 West Washington
Chicago, Illinois 60602
(312) 275-9100
Attorney for Petitioner

32pp

QUESTIONS PRESENTED

1. Does the Minnesota Court of Appeals' construction of State law that if a will is self proved it creates an irrebutable presumption of proper execution, absent fraud, violate Due Process.

2. Does the Minnesota Rule restricting use of its Court's opinions violate the First Amendment.

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OPINIONS BELOW

The first opinion of the Minnesota Court of Appeals appears at 449 NW 2d 509. The trial courts opinions on remand, the second opinion of the Minnesota Court of Appeals and the order of the Minnesota Supreme Court are reprinted in the Appendix.

JURISDICTION

Petitioner, John McCue invokes the jurisdiction of this Court by way of Petition for Writ of Certiorari under the authority of 28 U.S.C. §1257. The decision of the Minnesota Court of Appeals was filed on June 23, 1992. Petition for Review was denied on August 27, 1992 by the Minnesota Supreme Court.

STATUTES INVOLVED

"(b) If the will is self proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof or fraud or forgery affecting the acknowledgment of affidavit." Minn. Stat. Section 524.3-406.

Minnesota Rule of Civil Procedure 136.01 (b) provides: "A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel."

STATEMENT OF THE CASE

A. Procedural History. The probate of the Last Will and Testament of Willard S. McCue, offered by Willard's youngest son Mark, the personal representative, was objected to by John McCue, a son of Willard's. This objection was based upon improper execution, undue influence and lack of testamentary capacity. This case was twice heard by the Court of Appeals In re Estate of McCue 449 NW 2d 509 (Minn. App. 1990) and In Re: Estate of Willard S. McCue C-3-92--2465 unreported (Appendix 2). In its first opinion the Appellate Court remanded the case to the District Court for Trial, after having found that John McCue offered evidence as to 5 of the 6 factors bearing on a determination of undue influence outlined by the Court in In re Wilson 223 Minn. 409, 413, 27 NW 2d 429,

432 (1947) In re Estate of McCue 449 NW 2d at 512. Estate of McCue was thereafter tried before Judge James D. Mason in the District Court in Fairbault County, who entered his findings and order of formal probate on November 12, 1992, (Appendix 3), which was then amended on December 12, 1992 (Appendix 4), after John McCue filed his motion for amended findings. Both such District Court orders ruled against John McCue's objections to the probate of the will. By its unpublished opinion filed on June 23, 1992 the Court of Appeals affirmed the trial court.

The Court of Appeals resolved these issues and the issues contained in the argument in Petitioner's brief by affirming the trial court's finding that: (a) the will was self-proved and duly executed, (b) the testator did not lack testamentary capacity, and (c) the will was not the product of undue

influence.

B. On August 27, 1992 the Minnesota Supreme Court denied Petitioner's Petition for Review of Decision of Court of Appeals (Appendix 1).

John McCue's objections in the trial court were based on undue influence, lack of testamentary capacity and invalid execution of the will. Only the latter is before this court.

C. After Willard's death the will witnesses testified that their signatures were authentic, but they didn't remember seeing Willard and that they may have only witnessed the signature of the notary. The notary testified that not in the presence of the testator she brought the will to the witnesses while they were at their employment station on the bank teller line. Mark McCue, now the principal beneficiary of the will, testified to the contrary that the witnesses

were at the table when his father signed the will and Mark instructed the witnesses on the procedure. The will witnesses testified that they did not receive instruction on the execution procedure. No lawyer was present.

Willard had executed a prior will in December of 1983. In the words of the Court of Appeals, In re Estate of McCue 449 NW 2d at 511:

> "Willard's original will established a small trust for his daughter, and made several small distributions to his grandchildren, but divided the bulk of the estate equally between Mark and one of his brothers, appellant John McCue (John). Willard's third son, Paul, was not included in the will because of "the gift, sales, and other provisions" made to him during Willard's lifetime. When the will was revised in April 1986, the trust and the smaller distributions were continued. Mark's share, however, represents approximately 97.5% of the estate or $470,000, while John's share is $5,000."

After the will was executed Mark brought the original back to Regan, (an attorney) and

put the only other copy of the will in a safe at the family farm in Delevan, Minnesota where it remained until after Willard's death.

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REASONS FOR GRANTING THE WRIT

Minnesota Denied Petitioner's Right To Due Process Guaranteed By The Fourteenth Amendment.

A. Petitioner's cause of action to challenge the will of his deceased father is protectable under the Fourteenth Amendment to the United States Constitution.

This Court held in Tulsa Professional Collection Services v. Pope 485 U.S. 478, 99L.Ed2d 565, 108 S. Ct. 1340 (1988) that "...a cause of action against the estate for an unpaid bill...is property protected by the Fourteenth Amendment." 485 U.S. at 487. This Court followed its decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94L.Ed865, 70 S. Ct. 652 (1950) which this Court noted that the Court there held "...that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Tulsa Professional Collection Services v. Pope

485 U.S. at 487.

B. As construed and applied, Minnesota's Statute governing challenges to the execution of wills, denied Petitioner's Due Process rights to prove the will was not properly executed.

Petitioner sought in the Minnesota Courts to show that the will was not executed in accordance with Minnesota law. Minnesota sets forth the following requirement for execution of wills:

> "...every will shall be in writing signed by the testator...and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." Minn. Stat. 524.2-502 (Emphasis added).

This section was taken from the Uniform Probate Act Section 2-502.

In seeking to show by three depositions, affidavit and signed statements that the witnesses to the will did not witness

testator's signing of the will, nor testator's acknowledgement of his signature on the will or acknowledgement of the will, Petitioner was met with an irrebuttable presumption of due execution as construed by the Minnesota Court of Appeals. Minn. Stat. 524.3-406 provides:

> "(b) If the will is self proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof or fraud or forgery affecting the acknowledgment of affidavit." (Emphasis added)

The Court found that under the facts of the case "...due execution is conclusively presumed...", citing the above statute.

Petitioner had contended that there was fraud because, as shown in the depositions,*

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*Rule 32.01 (c) (2) of the Minnesota Rules of

the witnesses were brought the will by a bank notary (also deposed) and signed it outside the presence of the testator, and these witnesses neither saw the testator sign the will nor acknowledge it, in spite of the fact that the principal beneficiary of the will who was also present at the bank at the time, testified that they had so done.

Failing to find fraud, the court determined due execution was conclusively presumed. Petitioner had relied on cases

Footnote continued:
Civil Procedure provides that depositions of witnesses may be used in Court where the witnesses are at a greater distance than 100 miles from the place of trial which was Blue Earth, Minnesota in the south center of Minnesota near the Iowa state line. The two witnesses of the will were still tellers at a small bank near the nursing home where testator resided in Cold Springs, Minnesota where the will was executed, and their depositions taken. The bank notary public who conducted the execution of the will was no longer a bank officer in the bank in Cold Springs but was working at a bank in St. Cloud, Minnesota. Cold Springs and St. Cloud are well over 100 miles from the site of the bench trial in Blue Earth, Minnesota.

from other jurisdictions, with similar statutes, which held that even if there was a so-called self-proved will, due execution still had to be proved by the proponents of the will. Matter of Estate of Sample 572 P2d 1232, 1233 (1977, Mont. S. Ct.). In Re Estate of Ricketts 773 P2d 93, 95 (Wash. App. 1989), citing Matter of Estate of Sample and Boren v. Boren 402 SW2d 728 (Tex. S. Ct. 1966), the Washington Court held, "The execution of a valid will is a condition precedent to the usefulness of the self proving provisions of Section 59." Washington, Montana and Minnesota are Uniform Probate Act States. In Idaho, another Uniform Probate State, "...witnessing meant more than merely perceiving the existence of a document and signing it. Witnessing meant perceiving an act of the testator - signing or acknowledging the Will - and memoralizing this perception by subscribing the document."

Matter of Estate of McGurrin 743 P2d 994, 997 (Idaho App. 1987).

C. In Schlesinger et al Executors v. Wisconsin et al 270 U.S. 230, 70 L. Ed. 556, 46. S. Ct. 260 (1926) the Court had before it a Wisconsin Statute that provided that transfer of gifts within six years of death were to be construed as having been made in contemplation of death, and taxed accordingly. Within six years of Schlesinger's death he made gifts of five million dollars to his wife and three children. The estate claimed:

> "...as construed and applied below, the quoted tax provisions deprive them of property without due process of law, deny them the equal protection of the laws, and conflict with the Fourteenth Amendment." 270 U.S. 230, 238. This Court determined at P. 238 that:
>
> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material

> gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact." (Emphasis added)

This Court then struck down the Wisconsin Statute as violative of the Fourteenth Amendment this conclusive presumption of inter vivos gifts made within six years of death being made in contemplation of death. Accord: Heiner v. Donnan 285 U.S. 312, 76 L. Ed 772, 52 S. Ct. 358 (1932). This case had before it a similar federal law creating a conclusive presumption for gifts made within two years of death. Holding that such conclusive presumption violated the Due Process guaranteed by the Fifth Amendment this Court declared, "This Court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to

rebut it violates the due process clause of the Fourteenth Amendment." 285 U.S. at 312.

Justice Potter Stewart took another look at this concept in 1973. The Court had before it a Civil Rights Act suit by Connecticut university students who contended they were residents, but were classified as non-residents for tuition purposes. One of the Plaintiffs while at school in California became engaged to a Connecticut resident and student. She applied to a Connecticut State University and was classified a non-resident. She married the Connecticut State resident, and moved there a month later establishing a permanent home in Connecticut. By statute, her classification as a non-resident was <u>permanent</u> and <u>irrebuttable</u>. The plaintiffs claimed they had a constitutional right to controvert the presumption of non-residence by presenting evidence that they are bona fide residents of Connecticut. Following

Heiner v. Donnan, this Court held: "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis v. Kline 412 U.S. 441, 447, 37 L. Ed 63, 93 S. Ct. 2230 (1973). Justice Stewart in writing the Court's opinion noted that this Court struck down a Georgia statute which provided that if an uninsured motorist was involved in an accident and could not post security for damages claimed, his license would be suspended without any hearing on the question of fault or responsibility. Justice Stewart said this Court held that Georgia could not conclusively presume fault consistent with Due Process from the fact the uninsured was in an accident. Bell v. Burson 402 U.S. 535, 91 S. Ct. 1586 29 L. Ed2d 90, 91 S. Ct. 1586 (1972). The Court also followed Stanley v. Illinois 405 U.S. 645, 31 L. Ed 2d 551, 92 S.

Ct. 1208 (1972) in which this Court struck down as violative of the Due Process Clause of the Fourteenth Amendment, Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. In Vlandis Justice Stewart, for this Court, held that "...a permanent irrebuttable presumption of non-residence...is violative of the Due Process Clause..." Vlandis 412 U.S. at 454.

In the instant case the Minnesota Court of Appeals held "Under these facts, due execution is conclusively presumed. See Minn. Stat. §524.3-406 (b) (1988)." Since section 524.3-406 (b) creates a conclusive presumption of due execution of this will if there is no proof of fraud the Due Process Clause has been violated and this Court should grant this Petition.

THE MINNESOTA COURT'S ORDER VIOLATES THE FIRST AMENDMENT

Minnesota Rule of Civil Procedure 136.01 (b) provides: "A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel."

The Court of Appeals of Minnesota in their opinion puts the following prior restraint: "Pursuant to Minn. R. Civ. App. P. 136.01, subd 1 (b) this order opinion will not be published and shall not be cited as precedent." In striking down a prior restraint by a Nebraska Court this Court has held:

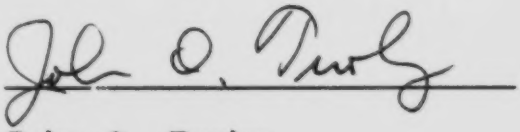
"Prior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights." Nebraska Press Ass'n v. Stuart

427 U.S. 539, 559, 49 L. Ed 2d 683, 96 S. Ct. 2791 (1976).

On this basis alone the Minnesota Court of Appeals opinion should be reversed.

CONCLUSION

For the above stated reasons, petitioner prays that a writ of certiorari issue to the Minnesota Court of Appeals and that this Court reverse the ruling of the Minnesota Court of Appeals.



John O. Tuohy
Attorney for Petitioner
John F. McCue

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STATUE OF MINNESOTA

SUPREME COURT

C3-91-2465

OFFICE OF
APPELLATE COURTS

AUG 2 7 1992

FILED

In Re:

Estate of Willard S.-McCue,
Deceased.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the motion of John McCue to admit John Tuohy of Chicago, Illinois to proceed pro hac vice with respect to the petition for further review be, and the same is, granted.

IT IS FURTHER ORDERED that the petition of John McCue for further review be, and the same is, denied.

Dated August 27, 1992

File No. P788560
FILED

AUG 3 1 1992

COURT ADMINISTRATOR
FARIBAULT COUNTY
MINNESOTA

BY THE COURT:

Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-91-2465

OFFICE OF APPELLATE COURTS

RECEIVED JUN 25 1992

JUN 23 1992

FILED

In Re: Estate of WillardS. McCue, Deceased.

ORDER OPINION

District Court File No. P7880560

Considered and decided by Short, Presiding Judge, Crippen, Judge, and Schumacher, Judge.

This case involves a contest over a will. Willard S. McCue (testator) executed a will under which one son (beneficiary) received $470,000 and another son, John McCue (son) received only $5,000. After the testator's death, the son objected to probate of the will on the grounds of improper execution, lack of testamentary capacity, and undue influence. The trial court initially limited the will contest to the issue of Improper execution. On appeal from that decision, we held the trial court abused its discretion by limiting the scope of the hearing on the will. In Re Estate of McCue, 449 N.W.2d 509 (Minn. App.

1990). On remand, the trial court found (a) the will was self-proved and duly executed, (b) the testator did not lack testamentary capacity, and (c) the will was not the product of undue influence.

On appeal from the order admitting the will to probate and denying a motion for a new trial, the son argues the trial court erred by (1) considering the testimony of the beneficiary concerning execution of the will, (2) determining the will was duly executed, and (3) finding no undue influence and making insufficient findings on that issue. The beneficiary seeks dismissal of the appeal and an award of costs and attorney fees.

The court being fully advised, and upon all the files, records and proceedings herein,

IT IS ORDERED, That:

1. The trial court's decision is affirmed. First, whether a will is duly executed is a fact question, and neither party is limited to the testimony of subscribing witnesses. Johnson v. Heltne, 298 Minn. 187, 19091,214 N.W.2d 224, 226 (1974). The pecuniary interest of a witness goes to the weight. not the admissibility of the witness' testimony.

Second, the trial court's factual determination that the will was duly executed is supported by the evidence. The record demonstrates

(a) the self-proving affidavit and acknowledgement of the testator, witnesses and notary complied with Minn. Stat. § 524.2-504 (1988); (b) there was no evidence of fraud or forgery in the signing of either the will or the self-proving affidavit and acknowledgment; (c) the testator was well acquainted with the procedures required to execute a will; (d) the witnesses were properly instructed concerning will execution procedures; (e) the testator received an instructional letter from his attorney before signing the will; (f) the beneficiary testified the will was properly executed; and (g) testimony from the witnesses and notary did not establish lack of due execution. Under these facts, due execution is conclusively presumed. See Minn. Stat. § 524.3-406(b)(1988).

And third, the son rafted to prove undue influence by clear and convincing evidence. See Minn. Stat. § 524.3-407 (1988); In Re Estate of Congdon, 309 N.W.2d 261, 268 (Minn. 1981). The record demonstrates the testator (a) was a strong-willed, opinionated individual; (b) knew how he wanted to divide his estate; (c) articulated his reasons for greatly reducing the son's share on numerous occasions; and (d) had sufficient mental capabilities to make his intentions known to his attorney. Where the record amply supports the trial court's finding of no undue influence, an analysis of the six

factors set forth in Estate of Wilson, 223 Minn. 409, 413, 27 N.W.2d 429, 432 (1947) is not necessary to facilitate our review. Because we do not believe the son brought this appeal in bad faith, we deny the beneficiary's request for costs and attorney fees. See Knutson v. Zenk, 413 N.W.2d 593, 598 (Minn. App. 1987).

2. Pursuant to Minn. R. Civ. App. P. 136.01, subd. 1(b), this order opinion will not be published and shall not be cited as precedent.

Dated: June :22, 1992 BY THE COURT

Marianne D. Short
Judge, Minnesota Court of Appeals

STATE OF MINNESOTA
COUNTY OF FARIBAULT

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
PROBATE DIVISION

In Re: Estate of
Willard S. McCue, deceased,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF FORMAL PROBATE OF WILL AND FORMAL APPOINTMENT OF EXECUTOR

This case arose pursuant to a Petition of Mark P. McCue dated September 7, 1988, for the formal probate of will and formal appointment of executor of the above named decedent. Although initially granted on October 11, 1988, it was vacated on March 30, 1989 on objection of John McCue. On December 21, 1989, the Minnesota Court of Appeals, in file CX-89-809, published at 449 NW 2nd 509 (1990), overruled previous 'limitations as to the issues to be determined, and remanded the matter for hearing both on the issues of testamentary capacity and undue influence, and directed the Probate Court to determine whether the Will is a self-proved will, and if it is, whether the conclusive presumption as to signature requirements is inapplicable by fraud or forgery affecting the

acknowledgment.

The matter came on for hearing before the Court, without a jury, on August 26, 1991, and continued through August 30, 1991. Bailey W. Blethen of the firm of Blethen, Gage & Krause, Mankato, appeared with and on behalf of the Proponent of the Will, Mark McCue. Charles Frundt, Frundt, Johnson & Roverud, Blue Earth, and John Touhy, Chicago, appeared on behalf of the Contestant of the Will, John McCue. Evidence was produced by both parties; subsequently, memoranda were submitted on September 27, 1991. Based upon the evidence, the arguments of counsel, and all the files and records heroin., the Court makes the following:

FINDINGS OF FACT

1. The Petition for Formal Probate of the Will and for Formal Appointment of a Personal Representative is compiete.

2. The time for any notice has expired and any notices required by the laws of this State have been given and proved.

3. The Petitioner is the son of decedent, an interested person as defined by the laws of this State.

4. Venue for this proceeding is in the County of Faribault, State of Minnesota, because the decedent was

domiciled in such County at the time of his death, and was the owner of property located in the State of Minnesota.

5. Decedent, Willard S. McCue, born December 27, 1902, died August 30, 1988, at Cold Spring, Minnesota.

6. Decedent was survived by four children, as indicated in the Petition: John McCue, Paul McCue, Sister Marilyn McCue, and Mark McCue.

7. Willard S. McCue executed a Will on April 10, 1986, the original duly executed Will being on file. This Will is a self-proved Will as provided in M.S. Section 524.2-504.

8. The Court is satisfied by clear and convincing evidence that the Opponent of the Will has not rebutted the presumption of M.S. Section 524.2-504 that decedent signed and executed the instrument willingly in the presence of the witnesses and that they signed it in his presence. There was no evidence of any fraud or forgery regarding the signing of the Will.

9. Decedent had been represented in estate planning by John E. (Jack) Regan, Mankato Attorney, from late 1981 or early 1982, and had drafted two previous Wills, as'well as other Codicils and property lists, prior to the Will in question.

10. There were two major changes in -testamentary dispositions between 1982 and 1986. In 1983, decedent eliminated any provision in the Will for his son Paul McCue, and in 1986, he eliminated most of the provisions for his son John McCue. The provisions for Sister Marilyn McCue and for his Church remained substantially the same, only eliminating Paul McCue as a contingent 'beneficiary and trustee.

11. Decedent lived at his farm home until the fall of 1984, when due to poor health, he went to the Mayo Clinic, and then to Assumption Rest Home in Cold Spring. His health improved, and he was discharged from the Rest Home in the spring of 1985.

12. Decedent remained at the farm home during the summer of 1985, living with his son, Mark McCue. In the fall of 1985, he visited his son John in Chicago. His son Mark drove him to Chicago, and accompanied him during much of the visit.

13. On October 9, 1985, decedent returned to the Assumption Home in Cold Spring, and he continued to reside there until his 'death on August 30, 1988.

14. In February of 1986, decedent entered the St. Cloud

Hospital for a colon examination, and in March, 1986, surgery was performed, including the removal of part of a lower bowel. He was returned to the nursing home on March 15, 1986, and resumed his normal activities. Decedent visited with various friends and relatives that spring. Many of them testified that he appeared alert, aware of his property, and competent in the spring of 1986.

15. On April 9, 1986, decedent was visited by his son Mark, and indicated a desire to change his Will. Mark, pursuant to his father's request, contacted Attorney John E. Regan in Mankato.

16. On that same date in Mankaro, Attorney Regan called decedent and discussed changing his Will. Decedent indicated that he wished to exclude John McCue from any farm land, and reduce his personal property division to the sum of $5,000.00.

17. On April 10, Mark McCue took the new draft of the Will from Attorney Regan's office, together with instructions for its execution, and delivered it to his father at Cold Spring.

18. That afternoon, Mark McCue and decedent went to Cold Spring State Bank, and sought the services of a notary

public, and witnesses, for the execution of the Will, pursuant to the directive given them by nursing home personnel. The Will was duly executed.

19. Decedent lived an additional two and a half years, and no evidence was presented with regard to any conversations with anyone as to any further changes in his Will.

20. Various friends and family members continued to meet with decedent at the rest home up until the time of his death.

21. On April 10,' 1986, decedent was aware of his property, was of sound mind, and understood what he was doing in the execution of the Will, and provided as he did without any undue influence from anyone.

22. The Will nominates Mark McCue as executor, directs no bond be required, and directs unsupervised administration.

Based upon the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Petition of Mark McCue to Probate the Last Will and Testament dated April 10, 1986, is granted.

2. The Last Will and Testament duly executed April 10, 1986, is hereby formally probated.

3. Mark McCue is hereby formally appointed as executor of the estate of Willard S. McCue, deceased, with no bond, in an unsupervised administration.

4. Upon qualification and acceptance, letters testamentary be issued to Mark P. McCue.

The Memorandum attached to this Order shall be considered a part of this Order.

This Order is subject to a stay of thirty days as indicated in the Memorandum.

Dated this 12 day November, 1991.

James D. Mason
Judge of District Court

Original: Court Administrator
cc: Bailey Blethen
Charles Frundt
John Touhy
Honorable J.W. Schindler

MEMORANDUM

The Court has provided for a stay of thirty days because of the provisions of M.S. Section 524.3-618, which provide that the special administration in this case will automatically be terminated on the appointment of a general personal representative. If counsel intend to take any other action, such as an appeal, request can be made to continue the special administration prior to its automatic termination.

The Court provided for an unsupervised administration, as that was requested in the Will and the provisions of M.S. Section 524.3-502 do not appear applicable.

The crucial issue in this case was the mental status of decedent in April, 1986. Decedent had been a patient of the Mayo Clinic for a number of years. They had accumulated a lengthy medical history. When he was admitted in September of 1984, he was having heart problems in addition to various other problems. The Court has some concern regarding diagnosis of "senile dementia," in the Mayo Clinic general records in 1984, but other than some reference to decedent's depression, there appears to be no concern by them as to his mental state.

The Court was particularly impressed with the testimony

of Dr. George Schoephoerster. Although Dr. Schoephoerster is a family physician, he has taken courses in geriatrics, and is taking steps to become board certified in geriatrics in the future. He treated the decedent during the time in question, and opined that decedent was not displaying any symptoms of confusion or disorientation on March 15, 1986, when he was discharged from surgery. He further opined that the decedent was alert, orientated, and able to make reasonable decisions. There was no evidence that any anti-depressive drugs affected decedent's orientation, if in fact he was taking them in early 1986. Apparently, the psychotropic medications, such as Haldol, were not prescribed until after April of 1986.

Although the testimony of Dr. John Boiler, licensed consulting psychologist, was helpful, he had the disadvantage of having to work from the medical records, rather than directly dealing with the decedent as Dr. Schoephoerster had done. He also did not consult other non-family members who visited the patient, such as Bill and Maurice Murray, a retired postmaster and his wife who testified that at a visit in May of 1986', decedent seemed perfectly normal, and discussed an upcoming baseball tournament, or Father Tom Jennings, who stated that in

the summer of 1986, decedent had a strong wit and humor, and was alert and focused and not a person who would be influenced.

It should be noted that the Court is not determining whether decedent made a wise disposition of his estate, merely that he had the full authority to dispose of it as he did in his Will, that he was of sound mind and memory in drafting the Will, and was not unduly influenced in making the provisions that he did.

JDM

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF FARIBAULT	FIFTH JUDICIAL DISTRICT
	PROBATE DIVISION
	File P7880560
In Re Estate of:	ORDER AND AMENDED
Willard S. McCue,	FINDINGS OF FACT AND
Deceased.	CONCLUSIONS OF LAW

The above entitled matter came on for hearing before the Court, without a jury, on December 11, 1991, by telephonic conference. The Proponent of the Will was represented by Bailey W. Blethen, Blethen, Gage, & Krause; the Contestant was represented by Charles Frundt, Frundt, Johnson & Roverud of Blue Earth, and John Touhy, Chicago. Oral argument was produced; an affidavit and exhibit regarding estate checks was previously received.

Based upon the evidence, the arguments of counsel, and all the files and records herein, the Court makes the following:

ORDER

1. That as additional clarification, the following paragraph, paragraph 8a, is added to the Findings of Fact dated November

12, 1991:

8a. The Court is satisfied by clear and convincing evidence that the requirements of M.S. Section 524.2-502 as to execution of the Will have been met. Included in this evidence is the presumption of M.S. Section 524.3-406 (b).

2. That Contestant's Motion for a New Trial is denied.

3. That Contestant's Motion for Amended Findings of Fact and Conclusions of Law is denied, except as set forth above by additional Finding 8a.

4. That Contestant's Motion to make additional Findings is denied, except as set forth in additional Finding 8a above.

5. That Contestant's Motion for Amended Conclusions of Law

is

denied.

The Court makes the following;

CONCLUSIONS OF LAW

1. That the stay issued by this Court on November 12, 1991, is continued until the day following the last day upon which an appeal may be taken, or until the appeal is filed and completed.

2. The special administration of the estate shall continue in effect as long as the stay of this Order is in effect.

3. The special administrators are authorized to exchange previously issued checks or vouchers drawn on the estate of Willard S. McCue to John F. McCue for new checks or vouchers in the sum of $14,614.99.

LET AMENDED JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 12 day of December, 1991.

James D. Mason
Judge of District Court

Original: Court Administrator
cc: Judge J. W. Schindler
Bailey Blethen
Charles Frundt
John Touhy

(2)

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-993

In The

Supreme Court of the United States

October Term, 1992

In re:

ESTATE OF WILLARD S. McCUE, Deceased

JOHN McCUE,

Petitioner,

vs.

ESTATE OF WILLARD S. McCUE,
MARK McCUE, Personal Representative,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
For The State Of Minnesota**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bailey W. Blethen
(Counsel of Record)
Kevin M. Connelly
Blethen, Gage and Krause
127 South Second Street
Mankato, MN 56002-3049
(507) 345-1166
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTIONS PRESENTED

1. Whether this court should review the constitutionality of a state statute where the outcome in the state court would be the same even if the statute were unconstitutional.

2. Whether this court should review a First Amendment claim where the Petitioner can demonstrate no harm, or threatened harm, from the claimed prior restraint.

3. Whether this court should review constitutional claims never raised, preserved, or passed upon in the state courts.

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STATUTES INVOLVED

1. Minn. Stat. § 524.2-502 states the following:

> Except as provided for writings within § 524.2-513 and wills within § 524.2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by the testator's direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

2. Minn. Stat. § 524.3-406(b) states the following:

> (b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

3. Minn. R. Civ. App. P. 136.01, Subd. 1(b), states the following:

> A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel.

4. Minn. Stat. § 480A.08, Subd. 3, states the following:

> Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the

unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.

STATEMENT OF THE CASE

Respondent adopts by reference Petitioner's statement of the case and adds the following:

The Last Will and Testament of Willard S. McCue was executed on April 10, 1986, and was attested to by two witnesses, Jane Schaefer, and Arlene Athmann, on that same day. The signatures of Willard McCue and the witnesses appear on Page 5 of the will (Respondents, Appendix, Page 9).

Page 6 of the will contains the self-proving affidavit signed by Willard McCue and the same witnesses (Respondents, Appendix, Page 10).

The state trial court found clear and convincing evidence that the will was duly executed in accordance with Minn. Stat. § 524.2-502. Petitioner's Appendix at Page 17 (order dated 12/12/91, ¶ 1); Pages 10 and 11 (order dated 11/12/91, ¶ 18). In addition, the trial court held that the will was a self-proved will according to Minn. Stat. § 524.3-406(b). *Id.*; Petitioner's Appendix at Page 8 (order dated 11/12/91, ¶¶ 7 and 8). The Minnesota Court of Appeals affirmed the trial court and stated that "the trial

court's factual determination that the will was duly executed is supported by the evidence." Petitioner's Appendix at Page 3 (order dated 07/22/92, ¶ 1).

SUMMARY OF ARGUMENT

The petition for a writ of certiorari is frivolous and fails to demonstrate that the Minnesota Court of Appeals' decision has directly infringed upon Petitioner's constitutional rights. A trial was held on the execution of Willard McCue's will, and the trial court found that it was duly executed. Petitioner's due process claim and First Amendment claim, raised here for the first time, are without merit.

ARGUMENT

I. Petitioner has no standing because he has failed to show that the Minnesota Court of Appeals' decision has directly infringed upon his constitutional rights.

It is well established that before a person can challenge the constitutionality of legislation, he must show that his constitutional rights would be directly infringed by the enforcement of the legislation. "Litigants may challenge the constitutionality of a statute only insofar as it affects them." *Fleming v. Rhodes,* 331 U.S. 100, 104, 91 L.Ed. 1368, 67 S.Ct. 1140 (1947). "In the absence of a showing of injury, actual or threatened, there can be no constitutional argument." *Anderson National Bank v. Luckett,* 321 U.S. 233, 242, 88 L.Ed. 692, 64 S.Ct. 599 (1944). The

"controlling question" is whether the Petitioner has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of the legislation. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 283, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961).

This court also established long ago that it has no jurisdiction to review abstract questions of law where there is no real and substantial controversy between the parties to the record. *Little v. Bowers*, 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620 (1890).

The Petitioner has shown no direct injury. Neither the self-proved will statute nor the court order restricting use of the court's opinion has been enforced by the Minnesota Courts so as to directly infringe upon the Petitioner's constitutional rights.

Even if Minnesota's self-proved will statute, Minn. Stat. § 524.3-406(b), was constitutionally infirm, the decisions of the trial court and Minnesota Court of Appeals would not be changed in any material way. The decision to probate the McCue will would stand because the trial court found that the will was duly executed pursuant to Minn. Stat. § 524.2-502 based upon the evidence presented at trial. This separate factual finding stands without the aid of the conclusive presumption contained in the self-proved will statute.

On the First Amendment claim, the Petitioner has not demonstrated that his freedom of speech will be restricted in any way by the court order. The order states that "this order opinion will not be published and shall not be cited as precedent."

The restriction against official publication only restricts the court's own use of its opinion, and does not affect the Petitioner's First Amendment rights.

As to the restraint on citing the opinion as precedent, the Petitioner has not demonstrated that he has any need to cite the opinion as precedent, nor has he shown that he has even made any attempt to cite the opinion in such a manner that would be restricted by the order. In addition, the Petitioner overlooked Minn. Stat. § 480A.08 which permits a party to cite an unpublished opinion provided that the party gives all other counsel a copy of the unpublished opinion at least 48 hours before its use.

The case relied upon by the Petitioner, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), involved a judicial order prohibiting everyone in attendance at judicial proceedings relating to a murder case from publishing or broadcasting accounts of confessions or admissions. This court held that the order violated the First Amendment's guarantee of free press.

Petitioner is under no immediate threat of infringement of his First Amendment rights as were the media in *Nebraska Press Ass'n*.

II. Petitioner's constitutional claims were never raised, preserved, or passed upon in the lower courts.

Petitioner raises his Fourteenth Amendment due process claim and First Amendment claim for the first time in his petition for a writ of certiorari and, therefore, his petition should be denied.

A review by this court on a writ of certiorari is discretionary, and this court long ago "established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana,* 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969). In *Cardinale,* this court dismissed the writ which was improvidently granted when the court learned during oral argument that the federal question before the court had never been raised, preserved, or passed upon in the state courts below.

> And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. 394 U.S. at 439.

III. The application of Minnesota's self-proved will statute does not conflict with decisions of other courts, and does not present an important question of unsettled federal law.

The Petitioner has cited no cases where any state's self-proved will statute has been challenged on constitutional grounds. There is no conflict among the courts relating to the constitutionality of self-proved will statutes, and this case does not present an important question of unsettled federal law. For these reasons, the petition should be denied. Supreme Court Rule 10.1.

The unconstitutional inheritance tax statutes and residency statute discussed in Petitioner's brief are different kinds of statutes and they do not draw into question the constitutionality of Minnesota's self-proved will statute.

See *Schlesinger, et al. Executors v. Wisconsin, et al.*, 270 U.S. 230, 70 L.Ed. 556, 46 S.Ct. 260 (1926); *Heiner v. Donnan*, 285 U.S. 312, 76 L.Ed. 772, 52 S.Ct. 358 (1932); *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1973).

The statutes in these cases contained conclusive presumptions which were contrary to the actual facts in those cases, and could not be overcome by evidence. For example, in *Schlesinger*, a Wisconsin inheritance tax statute conclusively established that gifts made within six years prior to death are "made in contemplation of death." This conclusive presumption was contrary to the findings of a Milwaukee County Court that the decedent, Schlesinger, had made gifts to his wife and three children within six years prior to his death and that none of these gifts were made in contemplation of death. This court held that the Wisconsin statute violated the Fourteenth Amendment because it was arbitrary and had no regard to actualities. 270 U.S. at 240.

The other United States Supreme Court cases cited by Petitioner, *Heiner, Vlandis, Bell v. Burson*, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1972); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), all involved similarly arbitrary statutes containing conclusive presumptions that were contrary to the actual facts of the case and which could not be overcome by evidence.

As the case law indicates, a self-proved will is identified in a two-step process. First, there must be an attested will which means it is signed by the testator and also signed by witnesses who attest that they observed the testator sign or acknowledge his signature in their presence. Second, the will becomes self-proved when the

testator and witnesses sign an attached affidavit reciting that the will was properly signed and executed.

The disputed presumption in Minnesota's self-proved will operates as an aid, not a hindrance to the fact finder. The presumption operates only after factual prerequisites are met. The signature requirements for execution of a will are conclusively presumed only after the proponent files the duly attested will along with the self-proving acknowledgment and affidavits attached to the will. Moreover, the opponent of the will can overcome the presumption with proof of fraud or forgery affecting the acknowledgment or affidavit.

The signature requirements for the Willard McCue will were conclusively presumed because the attested will and acknowledgment and affidavit were filed and Petitioner failed to prove fraud or forgery affecting the acknowledgment or affidavit. Moreover, unlike the cases cited by Petitioner, the Petitioner was allowed to present evidence on all relevant issues at trial.

The state cases cited by the Petitioner are distinguishable; none of them raise federal questions. Three of the cases involved wills that did not comply with the self-proved will statute because they lacked witness attestation. See *Matter of Estate of Sample,* 572 P.2d 1232 (Mont. 1977); *In Re Estate of Ricketts,* 773 P.2d 93 (Wash. App. 1989); *Boren v. Boren,* 402 S.W.2d 728 (Tex. 1966).

Petitioner also cites the case *of Matter of Estate of McGurrin,* 743 P.2d 994 (Idaho App. 1987), which is distinguishable because the testator did not sign or acknowledge his signature in the presence of the witnesses. He

telephoned them after he signed the will. This case did not involve a self-proving affidavit.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KEVIN M. CONNELLY
BAILEY W. BLETHEN
Attorneys for Respondent

APPENDIX

This Appendix includes a copy of the Last Will and Testament of Willard S. McCue.

Last Will and Testament

of

WILLARD S. McCUE

I, WILLARD S. McCUE, of Faribault County, Minnesota, revoke any prior Wills and Codicils, and make this my Will.

ARTICLE ONE
PAYMENT OF EXPENSES AND TAXES

1. My personal representative shall make payments from my estate as follows:

1.1 My personal representative shall pay from the residue of my estate the expenses of my last illness and funeral, valid debts, expenses of administering my estate, including non-probate assets.

1.2 My personal representative shall also pay any estate or other death taxes including any interest and penalties; provided, however, that my said personal representative shall not be responsible for the payment of any additional taxes imposed upon the assets of my estate by virtue of the operation of Section 2032A of the Internal Revenue Code, as amended.

1.3 All estate or other death taxes, including any interest and penalties, which are payable with respect to the property comprising my estate for tax purposes, whether or not such

property passes under this Will, shall be equitably apportioned among those persons interested in my estate to whom such property is or may be transferred or to whom any benefit accrues. Such apportionment shall be made in the proportion that the value of the property, interest, or benefit of such person bears to the total value of the property, interests, and benefits received by all such persons interested in the estate. In making such allocation, allowances shall be made for any exemptions granted by the act imposing the tax, and for any deductions allowed by such act for the purpose of arriving at the value of any specific asset and the net taxable estate. For instance, agricultural real estate which is valued at "special use value" pursuant to IRC Section 2032A in computing my net taxable estate shall also be valued at the "special use value" for purposes of apportionment of estate taxes hereunder.

So far as practicable, my personal representative shall deduct the amount of such taxes allocable to each beneficiary from the amount distributable to such beneficiary, and shall recover from all others for the benefit of my estate their allocable share of such taxes. I hereby authorize and direct my person [sic] representative to

/s/ Willard S. McCue
Willard S. McCue

****

take such action as may be necessary to collect such taxes and charges from the beneficiaries

responsible therefor, including, if necessary, encumbering specifically devised property with a mortgage loan, the proceeds of which would be used to pay the beneficiary's share of such taxes before distributing such property, whether specifically devised hereunder or devised as part of the residue of my estate, to such beneficiary subject to any such mortgage lien.

ARTICLE TWO
SPECIFIC GIFTS

2. I give the following:

2.1 My tangible personal property to the extent provided therein, in accordance with any written list, signed by me and dated, and otherwise prepared in accordance with the provisions of Minnesota Statutes, Section 524.2-513. The most recent written list shall control if there are inconsistent dispositions. I give all tangible personal property not disposed of by the provisions of any such written list is equal shares to my sons, JOHN F. McCUE and MARK P. McCUE.

2.2 To my son, JOHN F. McCUE, if he survives me, the sum of Five Thousand and 00/100 Dollars ($5,000.00).

2.3 To each child of my son, JOHN F. McCUE, who survives me, the sum of One Thousand and 00/100 Dollars ($1,00.00 [sic]).

2.4 To MATER DOLOROSA CATHOLIC CHURCH of Delavan, Minnesota, the sum of Two Thousand and 00/100 Dollars ($2,000.00).

2.5 Agricultural real estate owned by me at the time of my death, as follows:

2.5.1 To my son, MARK P. McCUE, if he survives me, agricultural real estate legally described as the North One-half of the Northwest Quarter (N 1/2 NW 1/4) of Section 14, Township 103 North, Range 27 West (consisting of 80 acres more or less), and the Southeast Quarter of the Southeast Quarter (SE 1/4 SE 1/4) of Section 12, Township 103 North, Range 27 West (consisting of 40 acres more or less), all in Faribault County, Minnesota. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE.

2.5.2 To my son, MARK P. McCUE, if he survives me, agricultural real estate legally described as the Northwest Quarter (NW 1/4) of Section 11, Township 103 North, Range 27 West, Faribault County, Minnesota (consisting of 160 acres more or less), including my residential dwelling, farm buildings, and all furnishings, appliances, furniture, household equipment, tools, power mower, etc., situated therein at the time of my death. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE. It is my wish, but

/s/ Willard S. McCue
Willard S. McCue

Last Will and Testament of
WILLARD S. McCUE
Page 3

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not an express condition of this devise, that as long as either MARK or JOHN continues

to own the residence thereon, he make it available to my daughter, SISTER MARILYN MARIE, S.S.N.D. (MARILYN McCUE), as her home for holiday and vacation visits.

2.6 To my son, MARK P. McCUE, as trustee of a trust to be known as the "MARILYN McCUE TRUST", the sum of Twenty Thousand and 00/1000 [sic] Dollars ($20,000.00). I direct my trustee to pay to or apply directly for the benefit of my daughter, SISTER MARILYN MARIE, S.S.N.D. (MARILYN McCUE), such sums from the net income and principal of such trust as the trustee deems necessary or advisable to provide her with funds for travel, education, and such other items for her personal use as she is permitted to have and keep. Further, the trustee may pay from principal or income such amounts for medical purposes as may be required to take care of medical needs of my daughter. Upon her death, any balance of principal or undistributed income then remaining in this trust shall be distributed in equal shares to my sons, JOHN F. McCUE and MARK P. McCUE, or if deceased to their descendants per stirpes. My son, as trustee, shall have all the powers now specified in the Minnesota Trustee's Powers Act, Minnesota Statutes, Section 501.66, which is hereby incorporated herein by reference. If MARK P. McCUE is unable or unwilling to serve as trustee, then I nominate my son, JOHN F. McCUE, as alternate or successor trustee hereunder.

ARTICLE THREE
RESIDUE

3. I give the residue of my estate, consisting of all property which I can dispose of by Will and not effectively disposed of by the preceding articles of this Will, including any growing crops on my land at the time of my death, to my son, MARK P. McCUE, if he survives me. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE.

ARTICLE FOUR
PERSONAL REPRESENTATIVE

4. I nominate my son, MARK P. McCUE, as my personal representative.

4.1 My said son shall have the power to nominate any additional or successor personal representative.

4.2 If my said son fails or ceases to so act and does not designate a successor, I nominate my son, JOHN F. McCUE, as my personal representative.

4.3 No bond shall be required of any personal representative nominated by me.

4.4 My personal representative, in addition to all other powers conferred upon him by law that are not inconsistent with those contained herein, shall have the power, exercisable without authorization of any court:

/s/ Willard S. McCue
Willard S. McCue

****

4.4.1 To sell at private or public sale, to retain, to lease, and to mortgage or pledge for the purpose of borrowing money, any or all of the real or personal property of my estate;

4.4.2 To make partial distributions from my estate from time to time and to distribute the residue of my estate in cash or in kind or partly in each, and for this purpose to determine the value of property distributed in kind;

4.4.3 To settle or to litigate claims in favor of or against my estate;

4.4.4 To exercise or not exercise any election or option granted my personal representative by the Internal Revenue Code or the tax statutes of any state without compensation to any devisee.

4.4.5 To continue in the same form any unincorporated business or venture in which I was engaged at the time of my death, for such period as my personal representative deems necessary or advisable, or to incorporate such business and continue its operation in corporate form whether or not any probable distributee of such business objects to such incorporation or retention in my estate.

ARTICLE FIVE
GENERAL GOVERNING PROVISIONS

5. The following provisions shall apply to the interpretation of my Will and the administration of my estate.

5.1 "Descendants" means all persons who are lineal descendants of the person whose descendants are referred to (including legally adopted lineal descendants) except illegitimate descendants and their descendants; "child" means a descendant of the first generation; "per stirpes" means in equal shares among living children of the person whose descendants are referred to and the descendants (taken collectively) of each deceased child of such person, with such descendants taking by right of representation of such deceased child.

5.2 I hereby express that it is not by inadvertence or oversight that I have not made gifts or devises to my son, PAUL D. McCUE. It is my opinion that considering the gifts, sales, and other provisions which I and my late wife, VIOLET M. McCUE, made to PAUL during our lifetimes, that he has been fairly treated.

5.3 The rules of law and statutes of the State of Minnesota, insofar as legally possible, except as altered by this Will, shall govern in all respects the meaning and legal effect of this will and the administration of my estate. Except as I have otherwise provided, all references to applicable law and Minnesota Statutes mean those enforce and effect on the date of my death and shall include any amendments and successor provisions thereto.

/s/ Willard S. McCue
Willard S. McCue

Last Will and Testament of
WILLARD S. McCUE
Page 5

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5.4 Captions are for convenience only and are not intended to alter any of the provisions of this instrument.

5.5 Where appropriate, the masculine includes the feminine, the singular includes the plural, and vice versa.

5.6 I direct unsupervised administration of my estate and that my estate be administered in as informal a manner as my personal representative deems advisable and applicable law permits.

In Witness Whereof, I have hereunto set my hand to this my Last Will consisting of five (5) typewritten pages, including this page, on this 10 day of April, 1986.

/s/ Willard S. McCue
Willard S. McCue

We certify that in our presence on the date appearing above in the State of Minnesota, WILLARD S. McCUE signed the foregoing instrument and acknowledged it to be his Will, that at his request and in his presence and in the presence of each other, we have signed our names below as witnesses, and that we believe him to be of sound mind and memory.

/s/ Jane Schaefer residing at Cold Spring, Mn
/s/ Arlene Athmann residing at Cold Spring, Mn

Last Will and Testament of
WILLARD S. McCUE
Page 6

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STATE OF MINNESOTA

COUNTY OF Stearns

We, WILLARD S. McCUE, /s/ Jane Schaefer, and /s/ Arlene Athmann the testator and the witnesses, respectively, whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his Last Will and that he had signed willingly, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the Will as witnesses and that to the best of their knowledge the testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ Willard S. McCue
Willard S. McCue
/s/ Jane Schaefer
/s/ Arlene Athmann

Subscribed, sworn to, and acknowledged before me by WILLARD S. McCUE, the testator, and subscribed and sworn to before me by /s/ Jane Schaefer and /s/ Arlene Athmann, witnesses, this 10 day of April, 1986.

/s/ Jane Welle
Notary Public

[SEAL]
JANE D. WELLE
NOTARY PUBLIC – MINNESOTA
STEARNS COUNTY
My Commission Expires October 1, 1987

GIFTS OF PERSONAL PROPERTY

I, WILLARD S. McCUE, hereby prepare the following list pursuant to Minnesota Statutes, Section 524.2-513, to direct disposition of certain of my items of tangible personal property in lieu of making specific testamentary disposition thereof.

	Description of Item	Name and Address of Beneficiary
1.	Large diamond ring	Mark P. McCue, Chicago, IL
2.	Holmes & Edwards Silverware	John F. McCue, Chicago, IL
3.	Grand Baroque Silverware	Mark P. McCue, Chicago, IL
4.	China dishes (wedding set)	John F. McCue, Chicago, IL
5.	Dishes, Crystal water goblets, television set	Mark P. McCue, Chicago, IL
6.	1983 Cadillac automobile (or replacement auto owned at my death)	Mark P. McCue, Chicago, IL
7.	1982 Cadillac Coupe d'Ville (or replacement auto owned at my death)	Mark P. McCue, Chicago, IL
8.	Gold Acutron watch and band	Mark P. McCue, Chicago, IL

Executed by me this 11 day of March, 1983.

/s/ Willard S. McCue
Willard S. McCue